IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.12.2006

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
&
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) Nos.2663 to 2665 of 2006

The Commissioner of Income-tax,
Salem. ..Appellant in all the T.C.(A)s.

Vs.

K.Bhuvanendran ..Respondent in T.C.(A) No.2663 of 2006

P.S.K.Jagannathan ..Respondent in T.C.(A) No.2664 of 2006

B.Saroja (LH)
Legal Heir of ..Respondent in T.C.(A)
P.S.K.Balasubramaniam No.2665 of 2006

Appeals under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai, 'D' Bench dated 17.03.2006 in I.T.(SS) A No. 116/Mds/2002 for the block period 01.04.1988 to 18.03.1999, I.T.A.No.2270/Mds/2003 for the assessment year 1997-98 and I.T.A.No.796/Mds/2004 for the assessment year 1997-98.

TC(A) 2663/06:

Against the order of the Commissioner of Income - Tax (Appeals) Salem in ITA.No.76/2001-2002 dated 21.03.2002 against the order of Deputy Commissioner of Income - Tax, Special Investigation Circle, Salem in PAN/GIR.No.B-722, dated 29.03.2001.

TC(A) 2664/06 :

Against the order of the Commissioner of Income - Tax (Appeals) Salem in ITA.No.118/2002-2003 dated 24.09.2003 against the order of the Income - Tax Officer, Ward I(1), Salem - 7 in PAN/GIR.No.HV-8990, dated 26.03.2002.

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TC(A). 2665/06

Against the order of the Commissioner of Income - Tax (Appeals) Salem in ITA.No.117/2002-2003 dated 09.12.2003 against the order of Income - Tax Officer, Ward I(1), Salem-7 in PAN/GIR.No.HV-8990, dated 26.03.2002.

For Appellant in all
the T.C.(A)s. : Mr.J.Narayanaswamy

JUDGMENT

(Judgment of the Court was delivered by
P.P.S.Janarthana Raja, J.)

These appeals are filed under Section 260A of the Income Tax Act, 1961 by the Revenue against the order of the Income Tax Appellate Tribunal, Chennai, 'D' Bench dated 17.03.2006 in I.T.(SS) A No. 116/Mds/2002 for the block period 01.04.1988 to 18.03.1999, I.T.A.No.2270/Mds/2003 for the assessment year 1997-98 and I.T.A.No.796/Mds/2004 for the assessment year 1997-98, raising the following common substantial questions of law:-

1. Whether the statement made during the course of search under section 132(4) of the Income Tax Act 1961 voluntarily by a person is admissible in evidence or not?
2. Whether in the facts and circumstances of the case an admission made voluntarily relating to undisclosed income, not immediately retracted within a reasonable time, and was retracted only after the service of summons during the course of recording statement would itself negate the admission?"

2. T.C.(A) No.2663 of 2006:

The facts arising out of this appeal are as under:

i) There was a search in the assessee's residential premises on 19.03.1999. Notice dated 26.10.1999 was issued under Section 158BC of the Income-tax Act ("Act" in short) to the assessee on 28.10.1999 giving 40 days time for filing the return. Subsequently, the assessee filed Return in Form 2B on 19.11.1999 declaring an undisclosed income of Rs.1,48,500/-. The assessee did not specifically included the sum of Rs.23 lakhs as undisclosed income in the Return eventhough he admitted the payment of the said amount relating to the purchase of a property at Door Nos.8 & 9, Arunachala Asari Street, Salem, by his wife, Rajalakshmi, and his sons K.B.Srinivasan and B.Sakthivel, over and above the amount of Rs.34 lakhs disclosed in the sale deed. Based on the admission, the Assessing Officer added the amount of Rs.23 lakhs as undisclosed income for the assessment year 1997-98 of the block period 01.04.1988 to 18.03.1999. Aggrieved by

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the order, the assessee filed an appeal to the Commissioner of Income-tax (Appeals). The C.I.T.(A) allowed the appeal and directed the Assessing Officer to delete the addition of Rs.23 lakhs. Aggrieved, the Revenue filed an appeal to the Income-tax Appellate Tribunal ("Tribunal" in short). The Tribunal dismissed the Revenue's appeal and confirmed the order of the C.I.T.(A).

ii) Learned Standing Counsel appearing for the Revenue submitted that a mere denial of payment of on-money over and above Rs.34 lakhs mentioned in the document, by filing an affidavit could not absolve the assessee from the consequences of the sworn testimony recorded under Section 132(4) of the Act. Further it is submitted that the assessee had no case to retract that the on-money has not been paid later and also the assessee himself has accepted that the admission given by him before the Deputy Director of Income-tax (Investigation) on the date of search is purely voluntary and not out of compulsion, or there is no undue influence on the assessee. Further it is contended, no more is necessary to prove and hence, the Revenue is right in assessing the sum of Rs.23 lakhs as undisclosed income for the block period.

iii) Heard the counsel. In July 1996, the wife and the two sons of the assessee purchased a commercial complex at Door No.8 & 9, Arunachala Asari Street, Salem for a sum of Rs.34 lakhs. In a statement recorded during the course of search, the assessee stated that a sum of Rs.23 lakhs was paid over and above the registered value shown in the document and also admitted that the same would be offered as undisclosed income for the block period. Later on, the assessee did not offer this amount in the Return for the block period, by a subsequent retraction by filing an affidavit. On facts, we found in the statement recorded on 08.02.2001 from the assessee, that the assessee had reached Salem from Chennai at 6.15 a.m. on 19.03.1999 and soon after the arrival, the search officials arrived at his premises at 7.30 a.m. placing two police officials with guns at the entrance of his house. The assessee did not have peaceful sleep during the train journey because of stomach pain due to gastric ulcer and was restless. The assessee was told by the search officials that the proceedings will be completed smoothly if he agrees that there is on-money payment of Rs.23 lakhs. Hence, the assessee also admitted the same, without being aware of the consequences. Further, the assessee made a statement that he was physically and mentally nervous and did not know what he answered and also denied on 08.02.2001 that neither he nor any of his family members made any on-money payment. Further it is seen from the record that the assessee is not the owner of the property and only his wife and children are the co-owners. Later, on 04.01.2001, all the three co-owners have also categorically denied payment of any on-money to the seller over and above Rs.34 lakhs mentioned in the registered document. Two statements were recorded from Shri.K.Jagannathan, the seller, on 23.04.1999 as well as on 08.02.2001 and he has also categorically stated that neither he nor any of his family members received any on-money from the buyer. Further there is no documentary evidence found or discovered

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during the course of search to prove that on-money has passed in the sale transaction. There is no basis for making addition by way of undisclosed income. The Assessing Officer had only relied on the statement of a person who is not a party to the immovable transaction and hence, there is no basis for determining the undisclosed income for the block period. The following factors emerges from the facts of the case:

a) No material found during the course of search;

b) Statement recorded from the assessee was subsequently retracted and rebutted;

c) Registered Sale Deed does not show any payment more than what was disclosed.

Taking into consideration of the above factors including the fact that the Revenue could not bring on record any material or evidence to show that the assessee had paid on-money of Rs.23 lakhs, we are of the view that the statement which is not relatable to seized material could not be a basis for making any addition in the block assessment. Both the first appellate authority as well as the Tribunal had given a concurrent finding. Paragraphs 4 and 5 of the order of the Tribunal, reads as under:

> "4. Admittedly no material was found during the course of search operation. The statement said to be recorded from the assessee was subsequently retracted and rebutted. The registered Sale Deed does not show any payment more than above what was disclosed. In the absence of any material, in our opinion there cannot be any addition as undisclosed income.
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> 5. Sec.158BB of the Income-tax Act provides for computation of undisclosed income. According to Sec.158BB undisclosed income shall be aggregate of the total income of the previous year falling within the block period computed in accordance with the provisions of Income-tax Act on the basis of the evidence found as a result of search or any other material or information available with the Assessing Officer and relatable to the evidence found during the course of search. In this case admittedly there is no evidence or material found during the course of search operations. The statement recorded from the assessee was subsequently retracted and rebutted. Further more, statement is not relatable to any seized material. Therefore, even the statement cannot be the basis for making any addition. When the Sale Deed discloses a sale consideration, it is for the Revenue to show that what was disclosed in the Sale Deed is not correct sale consideration. In this case the Revenue could not bring on record any material to show that the asssessee has paid on money of Rs.23,00,000/-. Therefore in our opinion the Id CIT(A)

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has rightly deleted the addition. We do not find any infirmity in the order of the Id CIT(A). Accordingly, we confirm the same."

From a reading of the above, it is evident that the reasons given by the Tribunal are based on valid materials and evidence and hence we do not find any error or legal infirmity in the order of the Tribunal and there is no special factor or compelling reason which warrants interference of the impugned order of the Tribunal. Hence no substantial questions of law arise for consideration of this Court and accordingly, the tax case is dismissed.

3. T.C.(A) Nos.2664 and 2665 of 2006:

The facts arising out of these appeals are as under:

i) The respondents in both these appeals are sellers of the said property situated at Door Nos.8 & 9, Arunachala Asari Street, Salem. The relevant assessment year involved in both these appeals is 1997-98 and the corresponding accounting year ended on 31.03.1997. The assessees in T.C.Nos.2664 of 2006 and 2665 of 2006, filed Returns of income admitting total income of Rs.62,640/- and Rs.75,900 respectively, on 31.03.1999 for the assessment year 1997-98. The Returns were processed under Section 143 (1)(a) of the Act and subsequently, notices under Section 148 were issued on the basis of information received from the Deputy Director of Income-tax that a survey was conducted in the business premises of the assessees consequent to the information gathered at the time of search in the case of Sri.K.Bhuvanendran, the assessee in T.C.(A) No.2663 of 2006. At the time of search, the said Bhuvanendran had admitted, while replying to the Question No.2 in the sworn statement recorded on 19.03.1999 that his sons Sri.K.B.Sreenivasan and B.Sakthivel and his wife Smt.B.Rajalakshmi had purchased a property at 8 & 9, Arunachala Asari St., Salem for a sum of Rs.34 lakhs as registered value and also paid Rs.23 lakhs as on-money to purchase the above property. In consequence of the same, a survey was conducted in the business premises of the sellers, the respondents herein, on 23.04.1999. The assessees denied the receipt of on-money from the purchasers. The Assessing Officer was of the view that the on-money of Rs.23 lakhs had been passed on to the sellers and hence the assessments were completed accordingly. Aggrieved by the orders, the assessees filed appeals to the C.I.T.(A). The C.I.T.(A) allowed the appeals and set aside the orders of assessment. Aggrieved, the Revenue filed appeals to the Tribunal. The Tribunal dismissed the appeals of the Revenue and confirmed the orders of the C.I.T.(A).

ii) Learned Standing Counsel appearing for the Revenue submitted that the Revenue is right in making assessments on the basis of the statement made by the buyer and hence, the assessments are in accordance with law.

iii) Heard the counsel. The Tribunal considered all the relevant materials and facts and come to a correct conclusion that there is no material available for the Revenue to assess the same. Paragraph 6 of the order of the Tribunal reads as follows:

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"6. Now coming to ITA Nos.2270/Mds/2003 & 796/Mds/2004, these appeals relates to the vendors of the property. The addition was made only on the basis of the statement said to be made by Shri Bhuvanendran on 19.03.1999. Admittedly, the said Shri Bhuvanendran retracted the statement. No other material was available to show that any on-money was paid. The Assessing Officer found that the property was located in a busy commercial locality and the market price is much more than the price quoted in the document. It is well settled principles of law that market is nothing but the price agreed between a willing purchaser and a willing seller. Therefore, it is for the purchaser and the seller to determine the market price after taking into consideration of the locality of the property. The state revenue authorities after considering the transaction accepted the market price disclosed in the Sale Deed. Therefore, the burden of proof is on the Revenue to show what is apparent is not real. In other words, the sale consideration disclosed in the Sale Deed cannot be rejected without any material to show that the sale consideration disclosed in the Sale Deed was not correct. In this case admittedly no material was available to show that the sale consideration disclosed in the Sale Deed was not correct. In those facts and circumstances in our opinion the CIT(A) has rightly deleted the addition. Accordingly, we do not find any infirmity in the order of the lower authority."

The reasoning of the Tribunal is based on valid materials and evidence. In the present cases, the Revenue failed to establish that there is actually on-money passed on to the seller and also there is no evidence to show that there is understatement of sale consideration in the document. If the Revenue is able to produce evidence to show that there is understatement of sale consideration in the document, the Revenue may be right in inferring that on-money has been passed on to the seller. It would be otherwise harsh and inequitable to tax the assessee on income which has neither arisen to him nor is received by him. It amounts to tax on notional or fictional income. Hence, we do not find any error or legal infirmity in the order of the Tribunal so as to warrant interference. Hence, no substantial questions of law arise for consideration of this Court and accordingly, the tax cases are dismissed.

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4. Under the circumstances, all the tax cases are dismissed. Consequently, T.C.M.P.No.1 of 2006 in T.C.(A) No.2664 of 2006 and T.C.M.P.No.1 of 2006 in T.C.(A) No.2665 of 2006 are closed. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Assistant Registrar,
Income-Tax Appellate Tribunal
Rajaji Bhavan, Besant Nagar, Chennai - 90.

2. The Commissioner of Income-Tax, Salem.

3. The Deputy Commissioner of Income-Tax,
Special Investigation Circle, Salem.

4. The Commissioner of Income-Tax (Appeals), Salem

5. The Income-Tax Officer, Ward-I(1), Salem.

3 cc To Mr.N.Murali, Advocate, SR.63019 to 63021.

T.C.(A)Nos.2663 to 2665
of 2006

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